No. 22,305

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

C & C PLYWOOD CORPORATION AND VENEERS, INC.,
Respondents

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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This reply brief is directed to certain contentions in the Companies' brief not fully treated in our opening brief.

A. The Board's Unfair Labor Practice Findings Are Valid and Proper

1. The Companies misconceive the import of the Supreme Court decision in *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421, rehearing denied, 386 U.S. 939. The Court did not reverse this Court "relying upon the absence of an arbitration clause" (Co. Br. 4) but only referred to this circumstance to distinguish that case from this Court's decision in

Square D Co. v. N.L.R.B., 332 F.2d 360, and in order to show that the Board's action was not "inconsistent with its previous recognition of arbitration as an instrument of national labor policy to compose contractual differences" (385 U.S. at 426). See also the Court's approval (*ibid.* fn. 10) of *Cloverleaf Div. of Adams Dairy Co.*, 147 NLRB 1410, 1416, where, notwithstanding an existing contractual arbitration provision, the Board remedied the employer's denial of the union's statutory right to be notified and consulted about changes in working conditions.[1]

Equally incorrect is the Companies' intimation that the unfair labor practice in the prior case was "highly speculative" (Br. 38) and that the violation was of a minor nature because it did not reduce wage rates (Br. 42) and its impact upon employees was "highly questionable" (Br. 20). The Companies further err in arguing that the unilateral action was "taken in good faith, in reliance upon clear contract language" (Br. 26), and in equating it with disputes concerning "a contractual interpretation, the disposition of a grievance or a demand in bargaining." (*Ibid.*). These contentions are contrary to the Court's emphasis on the "limited discretion which the Labor Act allows employers concerning the wages of employees represented by certified unions" (*loc. cit.* 425 n. 7); to its holding at 429, n. 15, that "* * * the real injury in this case is to the union's status as bargaining representative"; and to its rejection of the employer's contract interpretation (*loc. cit.* 430-431). See also our opening brief pp. 13-14. We note, moreover, that a unilateral increase in wages is as much a violation of Section 8(a)(5) as a unilateral reduction since both minimize the value of the union in the minds of the employees. *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217,

[1] C & C Plywood Co. argued in its petition for rehearing (p. 13) that the emphasis placed on the "absence of arbitration appears to have been a paramount consideration in the ultimate decision of this Court * * * [and that] such consideration was completely and totally foreign to any necessary evaluation or decision in this matter." Presumably, the Supreme Court did not agree with this contention.

223-225; *May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376, 383-386; *N.L.R.B. v. Katz*, 369 U.S. 736, 740-742.[2]

2. Consistent with their attempt to belittle the Supreme Court's decision in 385 U.S. 421, *supra*, the Companies argue (Br. 22-24, 28, 34, 50) that they could refuse to recognize, and bargain with, the Union after the expiration of the certification year because the violation of Section 8(a)(5) found by the Supreme Court was only of a minor and technical nature. They further claim that for this reason the Board's certification did not remain valid and binding upon them pursuant to the rule in *Mar-Jac Poultry Co.*, 136 NLRB 785, and the cases upholding it, as set out in our opening brief pp. 10-11, 14-15.

We submit that there is no valid distinction between the violation of Section 8(a)(5) committed by C & C Plywood (hereafter "C & C") during the certification year and the facts underlying the decisions relied on in our opening brief where employers were ordered to continue bargaining with a union after the certification year. As the Supreme Court has said in *Fibreboard Corp. v. N.L.R.B.*, 379 U.S. 203, 211:

> One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management disputes to the mediatory influence of negotiation. * * * [Footnote omitted.] The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42-43.

There is simply no way to achieve the ultimate purposes of the Act if, after the employees have chosen a representative,

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[2]The petition for rehearing took a totally different view of the unfair labor practice finding's probable impact, claiming that the decision "imposes a pandora's box filled with potential industrial relations chaos" and that it "* * * creates a national system of compulsory arbitration in total disregard of the actual will of Congress". (At p. 36.)

the employer remains free to act unilaterally. It is also immaterial that the employer's unilateral action in violation of Section 8(a)(5) occurs after a collective bargaining contract has been executed. The Company's contrary contention (Br. 25-28) flies in the face of the ruling in *Fibreboard, supra*, and numerous other cases holding that the duty to bargain collectively with the designated representative does not cease with the execution of a collective bargaining contract.[3] And insofar as the Companies argue (Br. 50-51) that C & C's violation was less far reaching than in the cases relied upon in our opening brief, it is enough to point out that in *N.L.R.B. v. Katz*, 369 U.S. 736, 740-741, the violation consisted in granting several benefits, such as merit increases and sick leave, and that in *N.L.R.B. v. John S. Swift Co.*, 302 F.2d 342, 344, 346 (C.A. 7), the previous violation resulting in an extension of the certification year amounted to nothing more than the refusal to furnish the union with data found pertinent to unresolved issues which were the subject of bargaining negotiations. See also *N.L.R.B. v. John S. Swift Co.*, 277 F.2d 641, 645 (C.A. 7).

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[3] *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421, 424-426; *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 436; *J.I. Case Co. v. N.L.R.B.*, 253 F.2d 149, 153, where the Seventh Circuit held that "*collective bargaining is a continuous process* which, 'among other things, * * * involves day to day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract.' *Conley v. Gibson*, 1957, 355 U.S. 41, 46. * * * A collective bargaining agreement thus provides 'the framework within which the process of collective bargaining may be carried on.' *Timken Roller Bearing Co. v. N.L.R.B.*, 1947, Sixth Cir., 161 F.2d 949, 955." (Emphasis the Court's). See also *N.L.R.B. v. Western Wirebound Box Co.*, 365 F.2d 88 (C.A. 9), involving the duty to furnish information in connection with the negotiation of amendments to existing labor agreements, and *Fafnir Bearing Co. v. N.L.R.B.*, 362 F.2d 716 (C.A. 2), as to an employer's duty to permit access to the plant as part of its duty to furnish information in connection with the administration of an existing contract—the violation of which duty constitutes a refusal to bargain regardless of the existence of a labor agreement and regardless of the otherwise harmonious relations between union and employer.

Moreover, the certification year has been extended where the bargaining relationship had broken down without a violation on the part of the employer. See cases cited at p. 11 and footnote 10 of our opening brief.

The Companies' entire brief is permeated with the contention that their refusal to meet with the Union must be tested by the standard of whether they acted in subjective good faith and by whether the Supreme Court's unanimous decision in 385 U.S. 421 could have been foreseen.[4] Such argument does not avail at all, for where, as here, a party refuses to meet and negotiate because of an erroneous view of the law, the frustration of the statutory bargaining requirements is complete and there is no occasion even to consider the party's subjective good faith. *N.L.R.B. v. Katz*, 369 U.S. 736, 743, and other cases cited at pp. 20-21 of our opening brief. Since that standard does not apply to the situation here involved, it is immaterial that it does apply in varying degrees in proceedings where a violation of Section 8(a)(1) or 8(a)(3) is at issue, and the numerous cases cited by the Companies dealing with the last named provisions of the Act are not in point and need not be discussed in detail.[5]

It is also immaterial that C & C was willing to discuss the terms of the unilaterally instituted premium pay plan with

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[4] See Co. Br. pp. 11, 16 ("absolutely no showing of any anti-union animus on the part of the employer"), 18, 20, 24-25, 36-38, 50, 55-56, 60-61, 62.

[5] *N.L.R.B. v. Citizen-News Co.*, 134 F.2d 970 (C.A. 9); *Don the Beachcomber v. N.L.R.B.*, __ F.2d __ (C.A. 9, 67 LRRM 2551, 57 L.C. Par. 12,493 (no violation of Section 8(a)(5) based on Section 8(a)(1) findings which were rejected by this Court); *N.L.R.B. v. Sebastopol Apple Growers Union*, 269 F.2d 705 (C.A. 9); *N.L.R.B. v. Kaiser Aluminum & Chemical Corp.*, 217 F.2d 366 (C.A. 9); *N.L.R.B. v. McGahey*, 233 F.2d 406 (C.A. 5); *N.L.R.B. v. Winter Garden Citrus Products Corp.*, 260 F.2d 913 (C.A. 5), where the court rejected the Section 8(a)(1) findings and held at 917-918 that the Board's Section 8(a)(5) findings were "makeweights thrown in to furnish background support for the findings of discrimination."

the Union (Br. 25-27), for, as noted by the Supreme Court C & C refused to rescind the plan during the discussions (385 U.S. 421, 424.). In any event, "it is clear from the record that * * * [the employer] took its unilateral action * * * before it met and conferred with the union on this action. The Board properly found this to be in disregard of its statutory obligation." *N.L.R.B. v. Central Illinois Public Service Co.*, 324 F.2d 916 (C.A. 7), enforcing *Central Illinois Public Service Co.*, 139 NLRB 1407, where the Board held at p. 1417, that "* * * the bargaining philosophy of the Act requires that good-faith negotiations precede rather than follow changes in bargaining conditions of employment." See also *Fibreboard, supra,* 379 U.S. at 213-214; and *Stark Ceramics, Inc. v. N.L.R.B.*, 375 F.2d 202, 206 (C.A. 6).[6]

The cases relied upon by the Companies where Section 8(a)(5) findings of the Board were overruled are inapposite. In *N.L.R.B. v. Gebhardt-Vogel Tanning Co.*, __ F.2d __, 67 LRRM 2364, 57 LC. Par. 12,431 (C.A. 7) (Co. Br. 23), the Court did not take issue with the Board's power to extend the certification year where there was "a factual basis" for finding that the employer had violated Section 8(a)(5) during the certification year by delay in furnishing

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[6]The Companies formally withdrew recognition of the Union as of November 1, 1963, as announced in their letter of August 27, 1963. (See our opening brief pp. 6 and 14, n. 12.) They now argue that "except for that one incident, both during the first year of the certification and including the additional period through to the end of the first contract * * * [they] dealt with the Union as the bargaining agent of their employees in every particular" (Br. 25); that "grievances were processed and bargaining was handled as though the antecedent unfair labor practice had not occurred" (Br. 38), and that "the parties * * * administered and worked under their labor contract for many months" after the unilateral introduction of the premium plan (Br. 42). The record is barren of evidence to support these contentions. Moreover, these allegations, if proved, would not affect the duty of the Companies to continue bargaining with the Union until the unfair labor practice has been remedied, and for a reasonable period thereafter. (See our opening brief pp. 9-11.)

information. However, the Court held that the employer was entitled to a hearing on the question of whether this certification-year unfair labor practice had in fact occurred; that the Board erred in basing its finding that this did occur on a show-cause order instead; and that in the absence of evidentiary support for such finding the extension was unjustified and the employer had not violated Section 8(a)(5) by refusing to bargain after the end of the original certification year because of a suspected loss of majority. Similarly, in *N.L.R.B. v. Electric Furnace Company*, 327 F.2d 373 (C.A. 6), (Co. Br. 55) the Court held that the unfair labor practice charge alleging refusal to bargain during the certification year was barred by the six-months statute of limitations (Section 10(b) of the Act), and that the employer's doubt as to the loss of the union's majority status after the lapse of that year was in good faith in view of the lawful discharge of nearly all employees in the unit. *N.L.R.B. v. Houston Chronicle Publishing Co.*, 211 F.2d 848 (C.A. 5) (Co. Br. 56), decided April 9, 1954, involved reversal of the Board's finding that statements by supervisory employees were coercive in violation of Section 8(a)(1), and of the finding that the employer's replacement of its circulation department by an independent contract system was motivated by a desire to avoid bargaining with the union. The court held that such change was motivated by business reasons and that the resulting discharge of the circulation employees did not violate Section 8(a)(3). On the basis of these holdings the court further found (at p. 855) that the employer did not violate the Act by thereafter refusing to bargain with the union for a unit of employees which included the validly discharged circulation employees.[7]

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[7]It is significant that the Fifth Circuit several days previously had held in *Armstrong Cork Co. v. N.L.R.B.*, 211 F.2d 843, 847-848, that the granting of individual merit increases without prior consultation with the union constituted, without more, a violation of Section 8(a)(5). (Additionally, the court found separate violations of Section 8(a)(1) and (3).)

The Companies' argument (Br. 40-41) that the Board erroneously distinguished its decision in *Midwestern Instruments, Inc.*, 133 NLRB 1132 (R. 58), is unpersuasive. In that case the employer refused to bargain over merit increases since September 1960, after a 9 months' period of good faith bargaining on other issues during which the Union acquiesced in the unilateral granting of merit increases. *Loc. cit.* at 1135, 1140. In the meantime 162 out of 333 employees in the unit had gone on strike at least as early as August 1960, some 40 to 60 strikers were rehired and the rest of the working force was made up of replacements. *Loc. cit.* 1136-1137, 1140, par. (9) - 1141.[8] There was no charge that the strike had started as an unfair labor practice strike or had been converted into such a strike, and the trial examiner's holding (at 1141) that the employer had a right to retain permanent replacements clearly implies the finding that the strike was not an unfair practice strike. The trial examiner did not make any finding that the September 1960 refusal to bargain on merit increases had become known to the employees but held (*loc. cit.* 1143) that even assuming that this was the case it could not be held that the refusal contributed to any defection among union members. In view of the factual situation thus presented in *Midwestern Instruments*, the Companies err in the statement (Br. 41, n. 21) that the Board affirmed the trial examiner's findings concerning the assumption of employee knowledge. A more natural interpretation of the Board's approval of the trial examiner's decision is that the Board considered the trial examiner's "assumption" as dictum and affirmed only his general finding that the employer "* * * lawfully questioned the * * * Union's majority status * * *". (*Loc. cit.* at 1132).

Nor does the instant case resemble *Stoner Rubber Co.*, 123 NLRB 1440 (Co. Br. 10, 34, 54). There, the union had

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[8]The Union had been certified in June 1959, on the basis of an election won by a majority of 85 out of 305 votes cast (*loc. cit.* at 1136).

won an election by a vote of 32 to 27. After the elapse of the certification year, the union conducted an economic strike, and the employer continued its operation with 18 old employees who had crossed the picket line although the strike was still in progress and 18 permanent replacements, all of which employees the employer believed to be anti-union. Several employees had told the employer that the union no longer represented the employees (*ibid*, at 1442, 1445-1446). The Board expressly found (*ibid*, at 1446, n. 14) that the employer did not commit any unfair labor practices before the alleged refusal to bargain. "In the face of this evidence it was not unreasonable to assume that the 18 early returning strikers and 18 replacements, all of whom were crossing the picket lines, were not adherents of the union. And, it was on the basis of this evidence that the Board held the presumption of continued majority lost its force * * *." *N.L.R.B. v. John S. Swift Co.*, 302 F.2d 342, 346 (C.A. 7), distinguishing *Stoner Rubber*.

Even less in point is *Mission Manufacturing Co.*, 128 NLRB 275, 276, 289 (Br. 40, 57), where the Board declined to attribute a striking union's possible loss of majority after the certification year to the employer's unlawful exclusion of the union from the disposition of grievances filed by non-strikers and replacements who had already demonstrated dissatisfaction with the union by crossing its picket line.

3. The Companies do not discuss the authorities cited in our opening brief (pp. 15-17) establishing that the Board was entitled to treat C & C Plywood Corporation and Veneers, Inc., as one for the purpose of the Section 8(a)(5) and (1) findings. They argue instead (Br. 59-60) that the Regional Director's unit finding in the representation case, which the Companies chose to accept (see our opening brief pp. 3-4), is not conclusive on them in the present proceeding, relying on *Amalgamated Clothing Workers v. N.L.R.B.*, 365 F.2d 898. In that case the District of Columbia Circuit held at pp. 903-905 that the Board's rule against relitigation in a subsequent unfair labor practice proceeding of issues decided in a representation proceeding does not give

the employer sufficient notice that he will be disabled, regardless of the context of the subsequent proceeding, from challenging each and every issue "which was or could have been raised in the representation proceeding." The Court found that a more natural reading of the rule was that it precluded relitigation in a "related" subsequent unfair labor practice proceeding—specifically, that where the complaint in the unfair labor practice proceeding charged not a refusal to bargain (such as in the case at bar) but interference with the rights of organization, the proceedings are not so related as to foreclose presentation to the Board of the underlying issues. It thus permitted the employers to claim in the unfair labor practice proceeding which charged coercion in violation of Section 8(a)(1) that the person alleged to be guilty of coercion was not a supervisor for whose acts the employer was liable. The Court stated (at p. 904) that its holding did not cover a situation "Where a company is charged with refusal to bargain with a union certified after election" and that such a proceeding was "sufficiently 'related' to the representation proceeding to preclude litigation of such common issues *as the scope of the appropriate bargaining unit and employees therein*" (emphasis supplied.)[9]

4. The Companies' description of the Board's present practice as to employer petitions for an election to determine the majority status of a certified union (Br. 32-35) is substantially correct. However, no such petition will be acted upon where an unresolved refusal to bargain charge has been filed, and particularly where such charge, as here, resulted in the issuance of a Section 8(a)(5) and (1) complaint. See *United States Gypsum Co.*, 157 NLRB 652,

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[9]The Court (at pp. 902-903) cited *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 158, and other "early cases" for the rule that at the subsequent hearing on a charge of refusal to bargain the Board need not allow the employer to relitigate before the Trial Examiner or the Board questions concerning the unit determination previously made by the Board. See also, *N.L.R.B. v. Tennessee Packers*, 379 F.2d 172, 179 (C.A. 6) cert. denied, 389 U.S. 958, and *N.L.R.B. v. National Survey Service, Inc.*, 361 F.2d 199 (C.A. 7).

655-656, *same*, 161 NLRB No. 61, 63 LRRM 1308, 1309 fn. 3; and compare *Ward Trucking Corp.*, 160 NLRB 1190. In one of the three election proceedings cited by the Companies (Br. 34)[10] the union had filed a Section 8(a)(5) charge but withdrew it with the Regional Director's approval before entering into a consent election agreement.

The argument (Co. Br. 38-39) that the Regional Director erred in not ordering an election because of the pendency of "an unproven, actually a highly speculative unfair labor practice * * * [charge]" is insubstantial. That unfair labor practice charge was subsequently found to have merit by the Board and the Supreme Court, and to hold an election while it was pending would have violated the Board's long standing rule, approved by the courts, set out at pp. 18-20 of our opening brief. It is, of course, immaterial that the Board's ruling concerning the prior unfair labor practice had not become final, because the duty to bargain has been imposed by the statute and does not depend on the issuance of a Board order. *N.L.R.B. v. Harris-Woodson Co., Inc.*, 179 F.2d 720, 723 (C.A. 4); *L L. Majure Transport Co. v. N.L.R.B.*, 198 F.2d 735, 739 (C.A. 5); see also *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 72-75.

B. The Board's Bargaining Order Is Valid and Proper

The Companies not only attack the Board's bargaining order in the present proceeding (Br. 56-61) but have the effrontery to request this Court (Br. 18, 63-64) to revise its Decree in No. 19,769, entered on August 31, 1967, pursuant to the mandate of the Supreme Court. The Board is administratively advised that the Company has not complied with the Court's decree; moreover, the entire tenor of its brief in the case at bar indicates that it is not willing to do so until the present Board order has been enforced by this Court. It is, of course, settled law that a bargaining order does not become invalid because of lapse of time since it

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[10] *Post Falls Lumber Co.*, 19 -RM- 663 (unreported).

has been issued or because of changes in the union's majority status. This holds good, *a fortiori*, where such order has been enforced by a court decree.[11] Only the propriety of the bargaining order in the case at bar merits discussion.

We submit that the decisions of the Supreme Court and this Court cited in our opening brief (p. 14-15) and not discussed by the Companies support our position that the unremedied conduct in derogation of the Union's certification justifies the bargaining order in the present case without affirmative evidence that such unlawful conduct was in fact the cause of any loss of the Union's majority. The authorities relied on by the Companies are either inapposite or have been disapproved by the Supreme Court. In *N.L.R.B. v. Logan Packing Co.*, 386 F.2d 562 (C.A. 4), the Court held (at p. 568) that the record contained no reliable evidence that the union *ever* represented a majority of the employees, and that there was no basis for rejecting the employer's claim of a good faith doubt. It further held (at p. 570) that the bargaining order was not justified by the employer's violation of Section 8(a)(1) because it found that such violations were "very minimal" and could not have destroyed the union's majority.[12]

The Companies' reliance (Br. 27, 57, 63) on *N.L.R.B. v. Marcus Trucking Co.*, 286 F.2d 583 (C.A. 2); *N.L.R.B. v. Superior Fireproof Door & Sash Co., Inc.*, 289 F.2d 713 (C.A. 2); and *N.L.R.B. v. Adhesive Products Corp.*, 281 F.2d 89 (C.A. 2), Friendly, C. J. dissenting at 92-93, is misplaced.

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[11] *N.L.R.B. v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 566-569; *N.L.R.B. v. Crompton Highland Mills*, 337 U.S. 217, 225; *N.L.R.B. v. Pool Manufacturing Co.*, 339 U.S. 577; *N.L.R.B. v. Katz*, 369 U.S. 736, 748, n. 16.

[12] The Fourth Circuit in *Logan, supra*, and in *Crawford Mfg. Co., Inc. v. N.L.R.B.*, 386 F.2d 367, petition for cert. pending, No. 1050, Oct. Term, 1967, generally rejected the reliability of authorization cards as proof of a union's majority. No such issue is involved in the case at bar.

The court found no element indicating employer interference with employee free choice in *Marcus Trucking*, and the remand of *Adhesive Products* to the Board was based on the Board's refusal to produce a statement given by a witness (at p. 407-409). As noted by the Second Circuit in *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F.2d 176, 181-182 (C.A. 2), cert. denied, 370 U.S. 919, "special considerations" were present in both cases. *Superior Fireproof, supra*, followed *Marcus Trucking, supra*, "* * * particularly because of the inordinate delay that characterized the course of this proceeding before the Board." This reason for making a bargaining order dependent on an election has been expressly disapproved by the Supreme Court in *N.L.R.B. v. Katz*, 369 U.S. 736, 748, n. 16, and in *Int'l Union Progressive Mine Workers v. N.L.R.B.*, 375 U.S. 396, reversing the Seventh Circuit's refusal to enforce an unconditional bargaining order because of a change in the union's bargaining status and the elapse of time since the violation (319 F.2d 428). And, in *N.L.R.B. v. Flomatic Corp.*, 347 F.2d 74 (C.A. 2) (Co. Br. 62) (Judge Hays dissenting) the union gave the employer reason to believe that it was only requesting a Board election; there was "only a minimal Section 8(a)(1) violation and no demand and refusal to bargain." *Irving Air Chute Co. v. N.L.R.B.*, 350 F.2d 176, 182 (C.A. 2); see also *United Steelworkers v. N.L.R.B.*, 376 F.2d 770, 773 (C.A. D.C.),[13] cert. denied, 389 U.S. 932. The Second Circuit now uniformly follows the rule that "where section 8(a)(5) has been violated by an employer who 'has refused to bargain under circumstances in which he was under a duty to do so * * * the remedy [a bargaining order] may be thought uniquely appropriate.' [citing *Flomatic, supra*, at 79]." *N.L.R.B. v. Consolidated Rendering Co.*, 386 F.2d 699, 704 (C.A. 2).

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[13] Accord: *N.L.R.B. v. Ralph Printing Co.*, 379 F.2d 687, 693 (C.A. 8). See also *Bryant Chucking Grinder Co. v. N.L.R.B.*, __ F.2d __, C.A. 2, decided December 12, 1967, 67 LRRM 2017, 2019, 2022, 56 L.C. Par. 12,344.

Philip Carey Mfg. Co. v. N.L.R.B., 331 F.2d 720 (C.A. 6), cert. denied, 379 U.S. 888 (Co. Br. 63) relied principally on *Perry Coal Co. v. N.L.R.B.*, 284 F.2d 910 (C.A. 7), cert. denied, 366 U.S. 949, which was in effect overruled by the Supreme Court in *Progressive Mine Workers, supra.* In *McLean v. N.L.R.B.*, 333 F.2d 84, 89, and in *N.L.R.B. v. H & H Plastics Mfg. Co.*, __ F.2d __, decided February 15, 1968, 67 LRRM 2572, 2576-2577, 57 LC Para. 12,490, the Sixth Circuit acknowledged the import of that decision as establishing that the Board and not the reviewing court is the proper body to assess the propriety of an unconditional bargaining order to remedy a Section 8(a)(5) violation. Accord: *N.L.R.B. v. Lifetime Door Co.*, __ F.2d __, C.A. 4, decided February 1, 1968, 67 LRRM 2704, 2706-2707, 57 LC Par. 12,543.[14]

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[14] *N.L.R.B. v. Minute Maid Corp.*, 283 F.2d 705 (C.A. 5) (Co. Br. 48, 49, 57) has been distinguished in our opening brief at p. 19, and the Court's attention has been directed to recent decisions of the Fifth Circuit holding that a bargaining order was proper where there had been no good faith bargaining during the certification year. *N.L.R.B. v. Citizens Hotel Co.*, 326 F.2d 501 (C.A. 5) (Co. Br. 62) does not avail the Company because the Court upheld the Board's finding that the employer's unilateral discontinuation of a Christmas bonus constituted a violation of Section 8(a)(5) and (1) and affirmed the cease-and-desist and bargaining portions of the Board's order. While the Court found that under the special circumstances of that case the Board's restitution order should not be enforced, no such order is involved here. (See p. 21, fn. 19 of our opening brief). *N.L.R.B. v. Dan River Mills, Inc.*, 274 F.2d 381 (C.A. 5) (Co. Br. 38, 57) involved an employer's refusal to bargain in reliance on a representation petition filed by a non-incumbent union—not, as here, by the employer itself with respect to a certified union—which led at first to a direction of election—not, as here, to an immediate dismissal. *Midwestern Instruments, Inc.*, 133 NLRB 1132 (Co. Br. 57, 64) is inapplicable for the reasons stated, *supra*, p. 8.

The Company's statement (Br. 51) that the Board has refused to issue a bargaining order in *J. P. Stevens & Co.*, 163 NLRB No. 24, 64 LRRM 1289 (not 163 No. 27, as cited by the Company), despite the finding of widespread and flagrant unfair labor practices, is correct but inapposite to the case at bar. The Board's denial of such order was based on the fact that the union in *Stevens* had not secured majority status, and the Board held that "[i]n view of the majority

CONCLUSION

For the reasons stated herein and in our opening brief it is respectfully submitted that the Board's order should be enforced in full.

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April 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
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principle in Section 9(a) of the Act we have serious doubts that the policies of the Act require or *permit* the issuance of a bargaining order where majority status has never been attained." 64 LRRM at 1292 (Emphasis supplied.) See *Local 57 ILGWU v. N.L.R.B. (Garwin Corp.)*, 374 F.2d 295 (C.A. D.C.), cert. denied, 387 U.S. 942, and the Board's order after remand, 169 NLRB No. 154, 67 LRRM 1296.